

Nguyen (Migration) [2024] AATA 1673 (6 June 2024)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Thi Le Nguyen
CASE NUMBER:	1915043
HOME AFFAIRS REFERENCE(S):	BCC2018/3742234
MEMBER:	Wan Shum
DATE:	6 June 2024
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211 of Schedule 2 to the Regulations • cl 820.221 of Schedule 2 to the Regulations •

Statement made on 06 June 2024 at 3:13pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine spousal relationship – financial aspects – nature of the household – social aspects – nature of the commitment – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
3. The applicant made a combined application for the Partner (Temporary) (Class UK) and Partner (Residence) (Class BS) visa on 13 June 2018 based on her claimed relationship with Mr Ngoc Tam Pham. At that time, Class UK contained Subclass 820 (Partner) and Class BS contained Subclass 801 (Partner).
4. The delegate refused to grant the Subclass 820 visa. The Subclass 801 visa was also refused as she was not the holder of a Subclass 820 visa and did not meet the alternative criteria.
5. The applicant sought review of the decision to refuse to grant the Subclass 820 visa and was initially represented in relation to the review. The applicant appeared before the Tribunal on 31 May 2024 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Ngoc Tam Pham. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

BACKGROUND

7. The applicant is a national of Vietnam born in April 1997. She first came to Australia in April 2016 as the holder of a student visa which was due to cease on 15 March 2020.
8. In June 2018 she made a combined application for the Partner (Temporary) (Class UK) and Partner (Residence) (Class BS).
9. To be granted the Partner (Temporary) (Class UK) visa, the applicant must satisfy the applicable visa criteria set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations) which includes cl 820.211. In this matter, the delegate found that the applicant did not satisfy clause 820.211(2)(a) or the alternatives set out in cl 820.211 of Schedule 2 to the Regulations and refused to grant the visa.
10. Clause 820.211(2)(a) requires that the applicant is the spouse or de facto partner of the sponsor, who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen at time of application and at time of decision respectively. In the present case, the applicant claims to be the spouse of Mr Ngoc Tam Pham, who was a permanent visa holder at the time of application but is now an Australian citizen by grant. For the purposes of this application, he is the sponsor. The sponsor was born in Vietnam and came to Australia in March 2016 holding a partner visa. His biological father, who had come to Australia in 1997 as a student and later was granted a permanent partner visa himself, had sponsored his mother for a partner visa in December 2013, and both the sponsor and his younger brother were granted visas as dependent applicants of their mother.
11. The issue in this review is whether the applicant is the spouse of the sponsor.

CONSIDERATION OF CLAIMS AND EVIDENCE

Whether the parties are spouses

12. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3). Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

13. The parties provided a copy of a marriage certificate which reflects that the marriage took place in Bankstown, Sydney on 14 January 2018 and was registered with the NSW Registry of Births, Deaths and Marriages the next day.
14. There is no evidence before the Tribunal that the marriage with the sponsor is not a valid marriage and the Tribunal finds that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

15. In determining whether the remaining requirements of s 5F are met, the Tribunal has carefully considered the evidence presented in respect of each matter in reg 1.15A(3)(a), (b), (c) and (d), and any other circumstances of the relationship under reg 1.15A(2) and sets out its findings below.

Financial aspects of the relationship

16. The evidence presented on this aspect of the relationship includes a joint bank account opened with Commonwealth Bank of Australia on 27 December 2017 with account ending #3134. The statements provided reflect that both their salaries during periods of employment have been transferred into this account. They both gave consistent evidence that the applicant was previously employed as a nail technician whilst the sponsor was employed at Pho Mai in Eastwood, starting as a kitchenhand in June 2016 and then progressing to become a cook. Since mid-2022, they have been operating a restaurant business together, and the profit earned from the business has been declared as 'trust share of net small business income' on their individual income tax returns from the Tam Family Trust of which Tam PH Pty Ltd is the non-individual trustee. The applicant and sponsor are the only shareholders of Tam PH Pty Ltd, which was registered on 11 July 2022.
17. They both gave evidence consistent evidence about their restaurant business, hours worked and profit earned and provided a recent statement of the bank account used for the business.
18. The parties have multiple bank accounts between them. The transactions appearing on their joint bank account statements reflect that the joint account is used for payment for groceries, petrol, subscriptions, mobile phone bills and also at a variety of what appear to be food outlets. The sponsor also has a home loan and associated bank account with NAB in respect of a property that he purchased at Chester Hill in April 2018. The property was

purchased in his name, but it is claimed that they both contribute to the loan repayments which the Tribunal accepts as the statements reflect that there have been transfers into the linked account which are described as amounts from their restaurant.

19. The parties both gave consistent evidence at the hearing about each other's previous employment and their financial circumstances which supports their claim to be in a married relationship.

Nature of the household

20. The applicant and sponsor stated that they began living together since December 2017, claiming that they lived together at Sir Joseph Bank Street in Bankstown, then Jacob St, Bankstown before they moved to Moora Street in Chester Hill in mid-2018, which is the property which the sponsor purchased in April 2018. The address given at the time they registered their marriage in January 2018 was at Sir Joseph Bank Street in Bankstown. While the copy of the sponsor's provisional driver's licence with an expiry date in December 2019 had the Sir Joseph Bank Street Bankstown address on the front, and the back sticker label had the Jacob St, Bankstown address, the Tribunal does not consider that this is conclusive evidence that he did not live at Moora Street in Chester Hill when the visa application was made in circumstances where he had purchased the property.
21. They both gave evidence that they are trying for a child and had started last year. They are now aged 27 and 30.
22. There are no rental agreements or similar with their names, nor payments identifiable as rent from their joint account. However, there is evidence that the applicant and sponsor have provided the same address to both private and government institutions since 2018 onwards and the Tribunal accepts that they have lived together since early 2018.

Social aspects of the relationship

23. The parties claim that they met in person on 3 August 2016 at the flat in Bankstown where the sponsor was living with his mother, brother and Ms Thi Thu Hong To, a friend of the applicant's, and connected over their common lack of a father figure when growing up. At the time they met, the applicant was enrolled for study in a Business course and the sponsor was studying English having come to Australia as a dependent on his mother's partner visa a month prior to the applicant's arrival.
24. Ms Thi Thu Hong To and the sponsor's mother have provided Form 888s declaring that the parties are in a genuine relationship and setting out details about their respective knowledge of the development of the relationship. On review, both were named as witnesses for the hearing.
25. In respect of joint activities, they gave mostly consistent evidence about how they spend their free time. They have travelled to Vietnam together on 3 occasions, the first time in February 2019, then June 2022 and May 2024, and gave consistent evidence regarding their joint and separate trips. Although the applicant had indicated in her statutory declaration of 1 August 2018 that they were planning to have a marriage ceremony in Vietnam in late 2018 or early 2019, the Tribunal notes that they did not claim or give evidence that they had done so until after the visa was refused. They claim that they held a ceremony on 12 June 2022 celebrating their marriage with friends and relatives in Vietnam and provided photographs of this occasion. The most recent trip to Vietnam was in May 2024 with the sponsor's mother and brother, although the parties returned to Australia earlier together.

26. There are photographs of the parties together and with others in Australia and Vietnam at various locations and on different occasions including their two separate marriage celebrations. The evidence reflects that the parties have represented themselves to their family and other people as being married to each other.

Nature of persons' commitment to each other

27. The parties claim that they had initially met in 2016 in Australia when the applicant was invited to a gathering arranged by the flatmate of the sponsor. They decided to marry in October 2017 and the marriage was held in Sydney in February 2018, when the applicant was 20 years of age and the sponsor was 25, with the plan being to have a separate event in Vietnam at a later date. The applicant's parents who both live in Vietnam did not attend the wedding in Sydney, although her uncle who lives in Australia was said to have been one of the witnesses. It is claimed that both the applicant's parents attended the celebration in Vietnam.
28. Although the applicant did not appear to know the full story about the circumstances between the sponsor's biological parents, the sponsor gave a reasonable explanation for not sharing these details. Other than this, they displayed a good knowledge of each other's circumstances and their evidence reflected that they are a couple who have a shared background and connection. They gave similar evidence about their future plans, which include starting a family and at some point, opening a nail salon for the applicant to run, as the applicant is passionate about nail art.
29. The Tribunal considers that the evidence reflects that they have had a mutual commitment to each other as husband and wife.

Other circumstances

30. There is some information before the Tribunal which suggests that the sponsor may have entered a contrived relationship with the applicant for migration purposes. While this cannot be ruled out completely, having had the benefit of additional information on review and evidence at the hearing, the Tribunal has formed the view that the parties are in a genuine married relationship. An assessment as to whether they are spouses will be made again at a later date for the permanent visa.

Conclusion

31. The Tribunal is of the view that the parties are committed to each other and they see their relationship as long-term. On the evidence presented, the Tribunal finds that they have a mutual commitment to shared life as husband and wife to the exclusion of others; are in a genuine and continuing relationship; and that they live together and do not live separately and apart on a permanent basis.
32. Given these findings the Tribunal is satisfied that the requirements of s 5F(2) are met both at the time of application and at the time of this decision. This means that the applicant meets cl 820.211(2)(a) and therefore satisfies cl 820.211. The applicant also satisfies cl 820.221 and the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

33. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl 820.211 of Schedule 2 to the Regulations
 - cl 820.221 of Schedule 2 to the Regulations

Wan Shum
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).